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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 980.

PHILADELPHIA BAR ASSOCIATION

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK HARWOOD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 3, 1884.

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INDEX.

	Original.	Print.
Transcript from district court filed	1	1
Petition	2	1
Demurrer	3	2
Petition for removal of cause	4	3
Bond for removal of cause	5	4
Petition overruled	5	4
Demurrer overruled	5	4
Answer	6	5
Testimony of ——— Scott	7	6
Frank Harwood	10	10
——— Scott (recalled)	12	12
James Porter	12	13
C. Fogerty	13	14
Dr. Hays	13	14
Dr. Doherty	14	15
James Cubertson	14	15
Demurrer to evidence	14	16
Testimony of Samuel Jolly	16	16
Wm. Parcels	18	17
D. N. Freeman	18	18
——— Scott (recalled)	19	19
Copy of contract	20	19

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	Original.	Print.
Testimony of Rudolph Morganfeldt	23	22
J. Newell	23	22
Frank Harwood (recalled)	23	22
Plaintiff's requests to charge	24	23
Defendant's " "	25	24
Instructions given by the court to the jury	30	29
Verdict	31	31
Interrogatories answered by the jury	31	31
Motion of defendant for judgment	35	35
overruled	35	35
Motion for new trial	36	36
denied	36	36
Judgment rendered	36	37
Certificate of Judge	37	37
Waiver of summons in error	37	38
Proceedings in Supreme Court—		
Petition in error	39	38
Waiver of summons in error	41	39
Hearing	43	39
Judgment	45	40
Opinion	47	46
Writ of error	55	44
Bond	58	45
Citation	61	41
Clerk's certificate	62	46

1 In the Supreme Court of the State of Kansas.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK HARWOOD, Defendant in Error. } No. 2986.

Be it remembered that on the first day of August, 1883, there was filed in the office of the clerk of the supreme court of the State of Kansas a case made from the district court of the county of Davis, which is in words and figures as follows, to wit:

2 *Case Made.*

"A."

STATE OF KANSAS, } *ss:*
Davis County, }

In the District Court sitting in said County.

FRANK HARWOOD, Plaintiff,
vs.
THE UNION PACIFIC RAILROAD.

Be it remembered that on the 13th day of July, A. D. 1882, Frank Harwood, above named, brought suit against the Union Pacific Railway Company in the district court of Davis county, Kansas, by filing his petition in the office of the clerk of said court on said day. A copy of said petition is as follows:

Petition.

In the District Court of Davis County, Kansas.

FRANK HARWOOD, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff complains, and says:

That the defendant is a corporation existing for the purpose of and operating a railroad into and through the State of Kansas.

That the plaintiff, on the 28th of February, 1882, was in the employment of Scott and Thurston, a firm doing business at Junction City, Davis county, Kansas.

That on the said day, in pursuance of his said employment, he went to the defendant's stock yards, along and near to the line of the said defendant's railroad in said Junction City, to assist his said employers to load hogs from the said stock yards on to the cars of the said defendant, to be carried and transported over the said defendant's railroad.

That the car which the agents and servants of the said defendant had caused to be placed near and against the shute of the said stock yards to receive the hogs of the said plaintiff's employers was out of repair and defective; that the servants of the defendant were,

while the said car was standing at the said shute, engaged in repairing the said car, and the plaintiff was in the discharge of his duties as an employee of said Scott and Thurston, watching the said shute and car to prevent the escape of any of the said hogs which were then in the said stock yards ready to be loaded.

That during the time said car was being repaired, one or more of the said hogs escaped through the shute of said stock yards into said car, and they were about to escape through the said car through a broken opening in the end of said car, which had not been repaired, and the plaintiff, in pursuance of his said employmont, went to the end of said car to drive them back and prevent their escape therefrom, and while so engaged, standing on the railway track at the end of said car, another car, belonging to the defendant, and under its control, which car a short time previously had been left by the defendant's servants upon the same railway track a short distance north of the car first named, and which car had by the said defendant's agents and servants been carelessly and negligently left on the rails of said railway track without being secured by application of brakes or other means or appliances to prevent said car from moving.

3 That there was strong north wind blowing at the time, and which wind, by reason of carlessness and negligence of the defendant's said agents and servants in not securing the said car by brakes or otherwise, did move and drive the said car forward and against the said car first mentioned, and, without any negligence or fault on the part of this plaintiff, the said car being so driven and impelled by the wind, did crush the plaintiff between the drawheads of the said two cars, and did then and there crush, wound, cut, and bruise the plaintiff in his body, from which he was for a long period of time very sick, lame, and sore generally, suffering therefrom both in body and in mind, and that he had to employ surgeons and physicians to dress his said wounds and to cure him of his said sickness, so caused great expense and cost, to wit:

$300.00, and for a long space of time the plaintiff was totally disabled from attending to his affairs and business to his damage, $1,000.00.

And that he suffered great pain and distress from said wounding, cutting, and bruising, and he has received and will suffer permanent physical injury from said wounding, cutting, and bruising to his damage, $9,000.00.

Wherefore plaintiff prays judgment against the defendant in the said sums, in all $10,300.00.

J. R. McCLURE,
JAMES HUMPHREY,
Attorneys for Plaintiff.

Thereafter, in due time, the defendant filed its demurrer to said petition, a copy of which is as follows:

STATE OF ARKANSAS, } ss:
Davis County, }

In the District Court sitting in and for the County of Davis.

FRANK HARWOOD
vs.
THE UNION PACIFIC RAILWAY COMPANY.

Now comes the defendant and demurs to the petition of plaintiff heretofore ffled herein, for the reason that it does not state facts sufficient to constitute a cause of action.

J. P. USHER,
A. L. WILLIAMS,
CHAS. MONROE,
Attorneys for Defendant.

At the same time that the defendant filed its said demurrer it also filed its petition and bond for the removal of this cause to the circuit court of the United States for the district of Kansas, and said petition and bond were so filed at the time the defendant entered its appearance herein and before the first term of court at which this cause stood for trial.

Copies of said petition and bond are as follows:

4 *Petition for Removal to the Circuit Court of the United States for the District of Kansas.*

FRANK HARWOOD, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

To said district court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That your petitioner was at the time of the commencement of this suit and still is a corporation other than a banking corporation, created by and existing under the act of Congress, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the amendments thereto, and other acts of Congress.

And that your petitioner has a defence arising under the laws of the United States.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no

further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the district of Kansas; and it will ever pray.

J. P. USHER,
A. L. WILLIAMS &
CHAS. MONROE,
Attorneys for Petitioner.

STATE OF KANSAS, } ss:
Douglas County, }

I, Chas. Monroe, being duly sworn, do say: That I am one of the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and the allegations therein contained are true, as I verily believe.

CHAS. MONROE.

Subscribed in my presence and sworn to before me, this 12th day of Aug., A. D. 1882.

[L. S.] A. HADLEY,
Notary Public.

Term expires Dec. 4, 1882.

5 Know all men by these presents, that we, E. Summerfield, of Douglas county, Kansas, and J. Copley, of Davis county, Kansas, are held and firmly bound unto Frank Harwood in the penal sum of five hundred dollars, lawful money of the United States for the payment of which sum, well and truly to be made unto the said Frank Harwood, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Yet, upon these conditions the Union Pacific Railway Company, having petitioned the district court of Davis county, State of Kansas, for the removal of a certain cause therein pending, wherein Frank Harwood is plaintiff, and the Union Pacific Railway Company is defendant, to the circuit court of the United States, in and for the district of Kansas:

Now, if the said Union and Pacific Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may — awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, in full force and effect.

Witness our hands and seals, this 12th day of August, A. D. 1882.

E. SUMMERFIELD. [SEAL.]
J. COPLEY. [SEAL.]

STATE OF KANSAS, } ss:
County of Douglas, }

I, E. Summerfield, of said county, one of the sureties named in the foregoing bond, do depose and say: That I am a resident of the

State of Kansas, and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than five hundred dollars.

E. SUMMERFIELD.

Subscribed in my presence and sworn to before me, this 12th day of August, A. D. 1882.

[L. S.]

A. HADLEY,
Notary Public.

Term expires Dec. 4, 1880.

The said petition and bond were presented to the court by defendant at the September term, 1882, of said court, and the court requested to make an order approving said bond and removing said cause to the circuit court of the United States for the district of Kansas; whereupon the court approved said bond and the sureties thereon, but overruled and denied the said petition for removal; to which order overruling and denying said petition the defendant at the time, by its attorneys, duly excepted.

And thereupon the said demurrer to the petition of plaintiff came on immediately to be heard, and the court, having heard the arguments of counsel thereon, overruled said demurrer, and defendant, by its attorneys, then and there duly excepted, and time was given by the court for the defendant to file its answer to the petition of plaintiff, and within the time given by the court the defendant filed its answer, a copy of which is as follows:

6 In the District Court for Davis County.

FRANK HARWOOD, Plaintiff,

vs.

THE PACIFIC UNION RAILWAY COMPANY, Defendant.

The defendant for answer to the petition herein filed says:

1. That the accident, to which the plaintiff claims to have been injured, was caused solely by his own negligence, and without negligence or fault on the part of this defendant.

2. For further answer defendant denies each and every allegation in said petition contained.

J. P. USHER & A. L. WILLIAMS,
Att'ys for Defendant.

In due time thereafter the plaintiff filed his reply to said answer, which was a general denial of the said answer.

And upon the issues thus made up this cause came on for trial before the court, and a jury, on the 23rd day of March, 1883, at the March, 1883, term of said court, and the trial was continued by adjournment from day to day till March 28th, 1883.

Upon said trial the following evidence was offered and introduced:

7 —— SCOTT, being first sworn, testified as follows:

I reside in Junction City, Kansas. I am partner in the firm of Scott and Thurston, and was a year ago, and in February, 1882. I am acquainted with the plaintiff Harwood. He was employed by our firm as a clerk. Our business is hardware and agricultural implements. We are also shippers of stock. I was preparing to ship hogs on the Union Pacific railway, at Junction City, February 28th, 1882.

Our hogs were in the Union Pacific Stock Yards. I ordered a car, and had taken Harwood and other employees down to help me load. I found some cars there, but the one intended for me was out of repair, and I went after Samuel Jolly, the Union Pacific car inspector, to come and repair it. While I was gone my employees moved the car by hand down to the shute, and were waiting for Jolly to repair it when I returned. That the car had been left by the railroad employees twenty or thirty feet from the shute; there were two other cars on the same track. One car had been placed fifty or seventy-five feet south of the shute for Porter to load, and the other was left coupled to the car; I was to have north of the shute. These two cars had been hauled north by the engine past the shute, and left one or two car-lengths north of the shute. The engine was then uncoupled and pulled up to the switch and on the main track. The two cars were left coupled together. I had ordered a car from the railway company perhaps the day before. The yard master pointed out this car to me. I don't know the yard master's name. The car nearest the shute was pointed out to me as the one I was to use. My hogs were in the Union Pacific Stock Yards when the cars were left on the track north of the shute. Jolly and another man, Morganfield was his name, were inside of the car fixing it. They closed up the hole in the north end of the car first. I was standing at the south end of the car. They had just got the south end closed up, and were going to the north end when I heard a crash. I did not see it, but ran around and found Mr. Harwood lying on the track. When I heard the car strike I heard Jolly exclaim: "My God; there is a man killed." I discovered Mr. Harwood lying on his face on the east side of the track. I started right up town for a doctor. He was loaded into Mr. Potter's wagon. I found Dr. Hays and Dr. Hunter, and took them to my house, where Harwood was carried. The two cars north of the shute were coupled together. They were left that way. I instructed my men to move one down while I was gone. That left the other car two car-lengths from the shute. The weather was warm, but there was a high wind from the North. We were waiting for the car, and ran the two cars placed and left on the track north of the shute. In the track north of the shute there is a slight decline to the south. We had loaded stock there several times before. The brakes were not applied on the north one of the two cars; I noticed that first after the accident occured. There was no one there to my knowledge to move the north car. I

don't think there was any one near the car when it started. Harwood, at the time of the injury, had just run round from the shute to the north end of the car to keep a hog from getting out of the hole at that end of the car. One of the hogs had got out of the yard through the shute into the car which Jolly and the other man were closing up; the hole in the south end of the car. I did not see Mr. Harwood at the time he was hurt. I should think it was about ten minutes after the cars were left on the track until the collision occurred, and about the same from the time the car was moved down to the shute until the collision occurred. I think the car was pushed down soon after it was left on the track. During that time Jolly was engaged in repairing the car. He was car inspector of the Union Pacific railway at this station.

8 As to his injuries, he was caught between the two drawheads; one struck him on the thigh and one behind, a little higher us.

He was badly bruised through the hips. There was a large hole close to the rectum, and his insides were squashed out.

Doctors Hayes and Hunter attended him from four to six weeks, and Dr. Doherty visited him twice. He was confined to his bed nearly two months, and then it was ten days or two weeks longer before he was out of the house, and then, at first, on crutches.

I took him out riding first, and soon after he got about with a cane.

He began to perform light labor last November or December. He did nothing before then. He went to his home in Michigan two months after he got out of his house; was gone two or three months, and was not able to resume his duties after his return last July. His wounds were still running when he returned. For medical attendance I paid Hayes and Hunter $125.00 at one time, and Dr. Doherty five dollars; for medicines, I paid nearly fifty dollars; and for nurses fifty dollars.

I paid all this money on Harwood's account; Harwood is a brother of my wife. My wife gave him her whole attention until he was nearly well.

I was up with him mostly nights; he had constant attendance while he was confined to his bed.

His employment was as a clerk for Scott & Thurston, at a salary of fifty dollars a month. He was a capable man. His suffering and bodily pain were very great for two weeks after the accident; then he had a secondary hemorrhage, and came very near bleeding to death. That set his case back. I think he is about twenty-seven years old; his habits are good. I thought he was worth fifty dollars a month before he was hurt.

He cannot perform the same work now that he could before. We have made no arrangement with him about wages yet. He has been doing more work lately than for the first two months after he started to work.

During that time he could not do half a man's work, such as we wanted him to do. I have frequently shipped hogs from the same yards that these hogs were shipped from.

Ques. What had been the uniform custom as to loading and placing cars at the shute previous to that time?

Question objected to, as incompetent, irrelevant, and immaterial. The question was then withdrawn.

Q. Do you know the custom and habit of other shippers as to loading cars and placing them at the shute?

A. Yes.

Q. State what had been the habit and custom between the railroad company and shippers about placing cars at the shute and loading them previous to this accident.

Question objected to by defendant's attorneys, as incompetent, irrelevant, and immaterial.

Which objection the court overruled, and the defendant, by its attorneys, then and there duly accepted.

The defendant's attorney then asked witness the following question:

Ques. Was not such habit and usage based upon special contract?

To which question plaintiff's attorney objected, as incompetent, irrelevant, immaterial, and because it was a matter for cross-examination.

Which objection the court sustained, and defendant, by its attorneys, then and there duly excepted.

Whereupon witness answered the question asked him by plaintiff's attorney as follows:

Ans. Our habits have been to load our cars—the company furnished cars, and we always loaded them. Sometimes the company left the cars a short distance away from the shute, as in this case, and the shippers placed them at the shute, and sometimes the company placed them at the shute.

9 Thereupon the defendant moved to strike out all the witness had said about placing the cars at the shute, because no custom as to that has been proved; which motion the court overruled, and the defendant, by its attorneys, then and there duly excepted.

I think the yard master directed these two cars to be left north of the shute. The yard master's duties were to station cars, to couple and uncouple them, and to do such other things as are usually required of yard masters.

Cross-examination:

It was near noon when the accident occurred; between eleven and twelve, but nearer twelve than eleven. I don't recollect that we were in a hurry to get through by dinner time. The train by which I wanted to ship the hogs was due somewhere about the middle of the day. When the car was at the shute, and ready for loading, the hogs could be loaded in ten minutes.

There are five or six pens to the stock yards. I have a yard ad-

joining the Union Pacific Stock Yards, and opening into them. There was no gate at the mouth of the shute in the pen communicating with it. There was a gate between the shute pen and other pens adjoining it; but when the hogs were in the last pen—the shute pen—there was no gate or anything else to prevent them from going from the pen up through the shute. The shute pen was large enough to hold a car load of hogs, and my hogs were all put in there by my employees before the cars were placed on the track north of the shute. There was an apron to the shute. I don't know whether my men put the apron in place, so that the hogs could go over it into the car, before the hog escaped into the car.

I don't recollect that I instructed my men to move the car from where it was left down to the shute. I don't know who uncoupled the two cars. It was plain to everybody that the car was unfit to load hogs in. There was a hole in each end big enough for hogs to go through. Harwood had helped me a good deal loading stock at these yards. He was capable to load it if I had not been there. Harwood must have seen and known that the car was unfit to be loaded with hogs, and so must all who were there. There was no particular one of my men who was the head when I was away. The apron to the shute is three feet long. The space between the shute and a freight car at the shute is from six to ten inches. I don't know how Jolly got into the car. My men had placed the hogs in the last car, where there was nothing to prevent them from going through the shute into the car after it had been placed at the shute, and which was before the holes in the ends of the car were closed.

Ques. If the car had been repaired so as to be secure, and the hogs had been kept out of it until it was ready for them, what occasion would there have been for Harwood to have been on the track at the end of the car where he was injured?

Question objected to by plaintiff's attorney as incompetent, irrelevant, and immaterial, and calling for opinion of the witness; which objection the court sustained, and defendant, by its attorneys, then and there duly excepted.

Ques. Do you know why Mr. Harwood was at the end of the car on the track when he was hurt?

Ans. I suppose to keep the hog from getting out of the hole in the end of the car. Where the cars were left north of the shute the track was straight; it curves up further north. I had no idea that there was any danger that the car would be moved by the wind. I did not think of it at the time. The car which ran upon Harwood could not have been started in any way but by the wind. I had moved cars along that track to the shute frequently before. The brakes were not set in the car that was moved. Harwood knew that as well as I did.

July 25, when several cars were left on that track, the brakes were usually set in one of them. I knew, and presumed that Harwood knew, that the brakes were not set on either of these two cars. Whenever I pushed a car along the track to the shute I never looked to see whether the brakes were set on other cars or not.

There was not grade enough on that track for a car to go down by its own momentum.

Redirect examination:

I heard no warning that the car was coming before it struck the car standing at the shute.

FRANK HARWOOD, plaintiff, being first duly sworn, testified as follows:

My name is Frank Harwood. In February, 1882, I was in the employ of Scott & Thurston. On the 28th of February, 1882, I was down at the Union Pacific Stock Yards, in Junction City, for the purpose of assisting to load some hogs for Scott & Thurston. It was near twelve o'clock when I was there. The first thing I did after I got down there was to drive the hogs from Scott & Thurston's stock yards into the Union Pacific Stock Yards. I had assisted Scott & Thurston to load stock at these yards before. I have generally helped them to load hogs and other stock there for the last four or five years. The car we were to load was not on the track when we got there, and put the hogs in the Union Pacific yard. I saw it placed on the track five or ten minutes after we got there. We drove the hogs into the shute pen to load while Scott was gone for Jolly, and then Freeman and I pushed the car down to the shute. We had the car down when Scott came back. We were waiting to have the car repaired when Scott came back. Jolly came back with Scott. While Jolly was closing up the hole in the south end of the car I was not doing anything. I think I was on the east side of the car. As I ran up to the north end of the car, I did not see the other car advancing. There were two cars left on the track by the yard master north of the shute. I don't know whether Freeman or I uncoupled the two cars, but one of us did. I did not look to see whether the brakes were set or the wheels blocked of the car we left standing north of the shute. I was at the stock yard near the shute when the railroad men left the two cars together on the track north of the shute. At that time the hogs were in the pen opening into the shute. It seemed to me that I was struck as soon as I got around to the end of the car. The car we had pushed down had been at the shute about ten minutes at the time of the collision. There was a very strong wind at the time, but the weather was warm. I was struck in the right hip. The engine went back on to the main track after it left the two cars on the track north of the shute. Nobody was left in charge of these two cars. No employee of the railroad company was about when we went to uncouple the two cars. I knew the car was the one we were to use, because it is always the nearest one to the shute that we use.

I was struck in the front of my thigh and back of my hip. I was facing to the south. I don't know whether I looked at the car to the north as I ran round to the north end of the car at the shute. I knew it was there, and I was going towards it. I was going to climb up on to the shute, when the hog started for the north end of

the car, and I ran round to stop it from getting out at the hole in that end of the car.

I was confined to my bed six weeks, and then could only stay up a little while at a time; when I got out I used a cane; I used a cane until August or September. I resumed work about the first of November. I could not be on my feet all day then. I can-
11 not work as well now as I could before I was hurt. I never tried. I don't think I can. I think my injuries are getting better slowly. I suffered pain after receiving this injury, sometime-very severe, sometimes not so severe. I took a good deal of morphine. My great pain and suffering continued two or three weeks. I did not become unconscious at the time of the injury. I am twenty-nine years old now; was twenty-eight then. I had good health before the injury. I had not been sick more than a week at a time since I came to Kansas. My wages were fifty dollars a month before the accident, and I boarded myself. I have had no regular wages since. When I wanted money I went and got it.

Cross-examination:

I had been accustomed to load stock at this place for good while, and sometimes went to load by myself; I don't know that Scott left any orders about pushing the car to the shute when he went for Jolly; he left us to do as saw fit; I saw the two cars put in on the track; the car we pushed down was from thirty to fifty feet from the shute; perhaps more; a car is thirty feet long; I may have uncoupled the car; I don't remember; I don't know whether I was present when it was uncoupled; I helped push it down; I don't know whether we had to apply force all the way or not; the cars run easy there; the car did not go beyond the shute when we pushed it down; we usually took sticks to put under the wheels when we stopped a car at the shute; I don't remember how it was on this occasion. I knew the car was unfit to put the hogs into when it was at the shute; I knew it was unfit before I pushed it down; all of Scott's men knew that; there was an apron to the shute; I was climbing up the shute to get in with the hogs so as to load them into the car; the hog that had got into the car caused me to change my mind about climbing up; when we uncoupled I knew the other one was there on the track.

I don't know whether the apron was up or down when I went to climb up on the shute; it is not much over a foot between the car and the shute when the apron is not down; the shute is about the same height as the bottom of the car door, say three and a half or four feet above the ground.

I never thought of the possibility of the other car moving by the wind or otherwise; I knew there was a slight grade there; I did not look to see whether the brakes were set on it or the wheels blocked when I went to push the other car down; the car we left on the track was about two car lengths from where I was struck; when I went north to the end [of] the car I went directly in the direction of the other car; I could have seen it if I had looked; I was looking at the hog; I think the car might have been moving while I was

going from the shute to the north end of the car at the shute; I have been in the habit of signing and receiving contracts for Scott for shipping his stock; I never read one of the contracts clear through.

Re-examination:

When the car was uncoupled and we started it to the shute, we did not disturb or start the other car; we left that stationary.

Ques. When the company did not place cars at the shute by the engine to be loaded, who had been in the habit of placing them?

To which question defendant objected, as being incompetent, irrelevant, and immaterial; which objection the court overruled, and defendant, by its attorney, then and there duly excepted.

Ans. Shippers.

Recross-examination:

The railroad company had nothing to do with putting the hogs in the shute pen where they were; if the hogs were in such a position that they could escape into a car before it was fit for use it was by our action; I had no other occasion to go on the track at
12 the north end of the car, except to stop the hog from getting out through the hole in the end of the car; have seen cars on the shute track before that needed repairs; I never knew of any permission from the company or its agents given to shippers to push cars to the shute before they were repaired.

Re-examination:

I don't remember of any railroad employee giving any orders that day to Scott & Co.; the company never repaired cars until requested to do so.

SCOTT, being recalled by defendant for cross-examination, testified as follows:

Ques. In all the instances to which your mind recurred in your direct examination about usage and custom of shippers in placing or loading cars, does your mind recur to any instance in which there was not a special written or printed contract for shipment?

Question objected to by plaintiff as incompetent, irrelevant, and immaterial, which objection the court overruled, and plaintiff, by his attorneys, then and there duly excepted.

Ans. Don't remember any instance in which there was not a contract. In that special instance there had been no contract signed at the time of the accident.

Re-examination:

The contracts are signed after the cars are loaded.

Recross-examination:

I know what the contracts are, and what I am to sign before I load.

Re-examination:

I never knew an instance when a car was left near the shute where the company offered to move it; I think the employees of the company knew we were in the habit of moving cars; they never offered to do it themselves; they offered men to assist us if we asked them when it was necessary; in such cases I applied to Copley or any railroad man I might meet; Copley is the agent of the company at Junction City.

Recross-examination:

I never asked the company for help to place cars when it was refused; I asked the yard master to place this car at the shute after he had placed Potter's car where he did; I think I swore at him because he did not leave my car at the shute; the car was passing the shute when I complained; I don't know whether he heard me; he was on the other side of the track, and the cars were between us; the cars were backed in from the north; the cars were backed south by the shute, and Potter's car left south of the shute, and then the other cars were backed north past the shute; the cars stopped on the yard master's signal; it was only a few moments before that that I asked him to leave this one at the shute; I knew the car was defective when it was backed past the shute; I don't know anything about Porter's order being in first.

JAMES PORTER, being first duly sworn, testified as follows:

I have shipped twelve or fourteen car loads of stock from Junction City on the Union Pacific railroad in the last two years; I recollect the occasion of the injury to Harwood; I was going to ship a car load of cattle; I was at the north end of the car at the time of the accident; Jolly and somebody else were repairing it; the ends of the car were out; the car left on the track north of the shute was thirty or forty feet from the shute; my car was left 150 feet south of the shute, so I could get to it to bed it; my cattle had just been driven into the yard; Scott's hogs were in the shute pen when
13 I got there, so they had to be loaded before I could load; my car was not ready to load; it had to be bedded, which would take ten or fifteen minutes; I had shipped six or seven loads before this one; the cars I used were mostly left away from the shute; I moved them to the shute myself most every time; when the car struck it moved the stationary car a little; the apron of the shute was down, and that arrested the motion; I did not hear the approaching car, and I was not in a position to see it; I have seen other parties ship stock, and when cars were left away from shute they had to move them to place of loading.

Cross-examination:

I wanted my car left where it was so I could bed it. I could not have bedded it if it had been left at the shute. I always bedded my cars when I shipped cattle; others sometimes did and sometimes did not. In order to bed a car it has to be left north or south of

the shute. The apron was down at the time of the accident; the apron is twenty inches long, and lacks six inches of being as wide as the shute. The side doors to the shute were slid out and were broken when the car struck. I think the train we were to ship by came between twelve and one; it may have been two; I could not tell. When Harwood was hurt the apron was down and the side doors slid out ready to load. There are four or six pens to the stock yards and an alley; the alley would hold a car load of hogs. There were other pens beside the shute pen; the hogs might have been in till the car was ready, where they could not have escaped into the car.

C. FOGERTY, being first duly sworn, testified as follows:

I have been a frequent shipper of stock on the Union Pacific railroad from Junction City for ten or twelve years; have shipped both cattle and hogs; the shippers always load their own stock.

Ques. State, if you know, what has been the custom as between the company and shippers about placing cars at the shute to be loaded; that is, whether the company or the shippers placed them there.

Question objected to by defendant, as incompetent, irrelevant, and immaterial; which objection the court overruled, and defendant then and there duly excepted.

Ans. The cars were not always put at the shute by the company; sometimes they were left on the track near the shute, and the shipper moved them to the shute; sometimes, when they were left near the shute, I could not move them to the shute myself, and Mr. Copley furnished me men to help me.

Cross-examination:

I had a written and printed contract of shipment with the company in all cases in which stock over the road. I always understood from the contract that I was to load myself; sometimes I requested the railroad men to help me, and sometimes when we were short of time the train men would help me to load.

Dr. HAYS, being first duly sworn, testified as follows:

Culbertson came up for me to go down to the depot to see Harwood; when I got there he had been taken away; I overtook him on my way back; I found him lying in Porter's wagon with his face down; we took him to Mr. Scott's house, and put him on a cot and took him up stairs and took his clothing off; I found a severe bruise in the fleshy part of his thigh in front, and he was badly bruised behind, and there was a large opening by the side of the bowels; I put my hand in and found it lacerated up for
14 six inches; I could put my entire hand in the hole; he appeared to have been struck by a blunt instrument; he was compelled to lie for some time on his face; he suffered all the time; had to keep him under opiates; there was an immense amount of matter from the wound; I had to heal by granulation; bled so much that he became pulseless; then gradually we got him over on to his

side; we kept him under the influence of opiates, I should think, for a month; first large doses, then small; he had a hemorrhage after two or three weeks, and bled profusely; I stopped that, and then he gradually improved; I think I attended him for six or eight weeks constantly; I thought it a very dangerous wound, but was unable to say in what the danger consisted; it was an injury that caused him great pain; the injury has left him weak and tender; when he exerts himself it affects him; I hope and believe it will gradually wear away; it may take years; doubtless will always affect him more or less; I think he will always have a weak spot.

Cross-examination

Harwood has no paralysis of his parts, and his injury did not affect his mind, memory, or senses.

Dr. DOHERTY, being first duly sworn, testified as follows:

I saw Harwood perhaps a week after his injury; I did not make an extensive examination; I was requested to go and see him by Dr. Hunter; I did not attend the case; I was there one night, and then went back the next day at the request of Mr. Scott; I was there but twice. It was a very severe wound, but when I saw him I gave the doctor hopes that he would get well. I should think that an injury like that would leave permanent weakness.

Cross-examination:

Considering the way he has improved, the things I have mentioned as likely to follow from such a wound may not have happened. From what I have seen of him on the street, I should say that he had done extremely well.

JAMES CULBERTSON, being first duly sworn, testified as follows:

I live in Junction City; I was with Mr. Porter at the Union Pacific Stock Yards, in Junction City, when Harwood was injured; I was at the south end of the car struck when Harwood was hurt; I did not hear or see the car approaching; the wind was blowing very hard and we could not hear much of anything; I came up town for the doctor.

Cross-examination:

The only business I had there was to help Porter.

The plaintiff here rested his case.

Thereupon the defendant filed its written demurrer to the evidence introduced by plaintiff, a copy of which is as follows:

STATE OF KANSAS, }
Davis County, } *ss:*

In the District Court sitting in said County.

FRANK HARWOOD, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant and demurs to the evidence introduced by the plaintiff for the reason that by it no cause of
15 action is proved.

J. P. USHER & CHAS. MONROE,
Attorneys for Defendant.

Thereupon the defendant moves the court to strike out all the evidence introduced by the plaintiff as to the custom or usage of shippers pushing cars along the track to the shute of the stock yards when the cars have been left near the shute by the company, because such evidence is incompetent, irrelevant, and immaterial; because it is proved that shippers of stock, in all cases, make their shipments under written and printed contracts signed by the shippers and the company, and because the evidence is not sufficient to prove a custom or usage.

Which motion the court overruled; and defendant then and there, by its attorneys, duly excepted.

16 SAMUEL JOLLY, being first duly sworn, testified as follows in behalf of defendant:

I am car inspector of the Union Pacific Railway Company at Junction City, and was in February, 1882. I had been here in that capacity for eleven years. Besides, I made slight repairs. I had charge of the material in the motive power department at this place. Cars were inspected to see if they were safe enough to carry a load. All cars were inspected before they were loaded. It was my duty to do it. I recollect Harwood being injured. Mr. Scott and Mr. Copley came to me while I was repairing another car, and requested me to go and repair the car Scott was to have. I asked Morganfeldt to go with me. He was a Missouri Pacific employee. We found the car at the shute. It was not then fit for use. I knew what car it was, so I took my material along with me. I found three or four boards cut out at each end of the car. I started to repair the hole in the south end first. Should think I was engaged about seven minutes in repairing that end. I got into the car at the hole in that end of the car. The east door was shut and the west door was blocked by the shute.

I sawed the boards the proper length, and Morganfeldt nailed them on. I finished sawing the boards at the north end of the car, and picked up my boards and started for the south end of the car. On the way I passed one or two hogs. One hog made for the hole in the north end of the car. I tried to get around it to head it off. Just at the instant that I looked at the hole in the north end of the

car I saw the other car strike Harwood. I had not seen the car moving, and had no idea that there was any danger of its being moved by the wind. When the hog came into the car some one cried out: "There's some company for you, Jolly." At the time Harwood was struck he seemed to be trying by motions to scare the hog back. The apron to the shute is three feet seven inches long across the shute, and two feet and one or two inches wide. It can cover a gap of two feet. When the apron is not in use it is folded over into the shute, and obstructs passage through the shute, being seventeen or eighteen inches high. When the car struck the cars separated about three feet, but I don't know which car moved. There is quite a decline from the north end of that track to within a few feet of the shute. The track is straight from the centre of the shute to the north for not exceeding forty feet, and then there is a sharp curve. I observed the car standing on the track north of the shute. It was from 65 to 80 feet from the shute, which would carry it twenty-five to forty feet on to the curve. The curve was not very sharp, but enough to retard the progress of a car considerably. The wind on that day was blowing very freely. It might have moved it; not without gusts. The wind was blowing in gusts on that day. I had no reason to apprehend that the wind would move the car. It takes more power to move two cars standing together than it does one. The grade was perceptible to one who was acquainted with the place. It was three inches in eighty feet—no; it was not that much either. I think I asked them to wait till I got the car repaired before loading. The hole in the north end of the car was about three feet; not exactly square, but a little wider at the bottom than the top, and three feet high. The car had been used for carrying rails, and the holes had been cut to enable them to load rails into it.

Cross-examination:

In the spring the wind is apt to blow in gusts and to veer around and the gusts to increase in force. A head wind might blow two cars as easy as one, but I don't know that this was a head wind that day. There was quite a curvature on that track. Scott's car had been in the yard all the morning on another track. The cars are all inspected as they come into the yard, but they are only repaired as needed. A stock car weighs from eighteen thousand to
17 twenty-five thousand pounds. This class of cars weighs from eighteen thousand five hundred to twenty thousand pounds. They vary in width. The average is seven feet and nine inches. The height is from seven feet six inches to eight feet three inches from the floor of the car to the center of the ridge. This car was eight feet.

18 WM. PARCELS, being first duly sworn, testified as follows in behalf of defendant:

I was employed as yard master in the Union Pacific yard at Junction City in February, 1882. I had been there fifteen months. I had been there two or three months at the time of the accident to Harwood. I am under the direction of the agent, but when directed

to remove cars to a place I move them there according to my own judgment. The engineer moves by the direction of the yard master. On the day of the accident I was directed by Copley to set some cars on to the shute track; they were on another track east of the main track. Some time in the morning he ordered me to move certain cars during the day. I recollect setting these three cars on to the shute track. I was ordered by Copley to set Porter's car further south of the shute, so he could bed it, and then leave the others north of the shute, so that Porter could load first. I don't recollect Scott saying anything to me. We backed down and left Porter's car, and then pulled north by the shute and cut off these two cars and left them on the track coupled together. I did not set the brakes; I did not think it necessary. I had no thought of the wind moving the cars. We never set brakes on that track unless on a train that we move in there. We have been in the habit of kicking cars in on to that track from the north end and letting them go by themselves, and there is not enough grade there so but what they will stop most anywhere. The grade is not enough so that a car will move there by its own weight. The grade is very slight—so slight that I have seen wind blow cars in the other direction.

D. N. FREEMAN, being first duly sworn, testified as follows in behalf of defendant:

I live in Junction City and am a teamster. I know Scott and Harwood. I was in the employ of Scott in February, 1882. I was present at the time of the accident. It occurred near twelve o'clock. The hogs were put in the pens a few minutes before twelve. In the Union Pacific Stock Yards there is a large pen and an alley and two small pens, besides the shute pen. Scott's yard communicated with the large pen and the alley both. The alley was from sixty to eighty feet long and twelve feet wide. The hogs were turned into the shute pen before the car was placed at the shute. I stood at the shute part of the time to keep the hogs back in the shute when the car was pushed down. It lays at an angle which makes it at least six or eight inches high. Harwood and I went for the car. I don't know as anybody told us to go for it. While we were gone there was nobody to watch the hogs and keep them from going up the shute. I usually reckoned Harwood as foreman, between him and me. We found the car out of repair. We knew it was out of repair before we went to push it down. I don't remember which of us uncoupled. It was coupled to another stock car. Boards were off of each ends of both cars. We pushed the car down to the shute. I let the apron down after Mr. Jolly had got the south end of the car about done. The hog jumped over the apron into the car soon after it was pushed down and before I got up on to the shute. I did not see Harwood hurt, and did not see the car come down. I had my back to it. When we went up to get the car the brakes were not set on either car, nor were the wheels blocked. We moved the car a car's length. I had no idea the other car could be moved by the wind. I signed the contract for the shipment of these hogs after the accident. (Contract is here shown witness.) I signed Scott's and Thurston's names to

the contract. They had no other employee present. I reported to
Mr. Thurston what I had done; told him that I had billed
19 the car out, and he said all right.

Cross-examination:

The hog got into the car before the apron was put down, I think. No one told me to put the apron down.

Mr. SCOTT, being recalled, testified as follows:

The hogs were shipped on the contract just shown Freeman. I approved of Freeman signing it.

The contract was here offered in evidence, to which plaintiff objected, as incompetent, irrelevant, and immaterial.

Which objection the court overruled, and plaintiff, by his attorneys, then and there duly excepted.

Copy of said contract is as follows:

20 UNION PACIFIC RAILWAY COMPANY.

Rules and Regulations for the Transportation of Live Stock.

Blood animals, or animals deemed especially valuable, will be carried only on special contract, and agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the general or assistant general freight agent.

Live stock not especially valuable will be rated at first-class rates upon the following estimated weights: One horse, mule, or horned animal, 2,000 lbs.; two horses, mules, or horned animals, 3,500 lbs.; three horses, mules, or horned animals, 5,000 lbs.; each additional animal, 1,000 lbs.; hogs, sheep, lambs, and calves will be estimated at actual weight, but not less than 300 lbs. each, and be charged first class. One will not be charged less than 75 cents, however short the distance. Stallions estimated at 4,000 lbs.

In case damages occur in transporting live stock, for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion, $200; horse, $100; mule, $65; cattle, $50; other animals, $20.

At the above classification the company agrees to take proper care of the animals, and assumes the liability, not exceeding the amount given above, for loss or damage which may occur to them through the fault or negligence of its officers, agents, or employees while in transportation over its road.

In case, however, the owner or consignee agrees to save the company from liabilities for loss or damage occurring from any or all of the causes enumerated in the following contract, and agrees to comply fully with all the conditions therein named, a special rate will be given upon ordinary stock in car load lots:

A shipment upon these conditions of one car of stock will entitle the owner or man in charge to a half-fare ticket to ride on

the train with the stock to take care of it; of two or three cars will entitle one man in charge to pass on the train with this stock; of four cars and upwards will entitle two men in charge to pass on the stock train, which is the maximum number which will be passed on any train for one shipper or party.

No return passes will be given to owner or men in charge under any circumstances. Persons not accompanying the stock on same train, but preceding it or following after on passenger or freight trains, will not be passed on stock contract, but charged regular passenger fare, nor will the money be refunded or passes given for fares thus paid.

The agent at the station where the stock is loaded will issue special tickets to men in charge of stock, who are entitled to pass free or at half rates, which ticket must be filled out in accordance with instructions from the general ticket office, and signed by the passenger, and passenger's name must be entered upon the back of this contract.

Such tickets will be honored only when presented with the contract, and upon the train conveying the car or cars named in the ticket.

Agents will refuse to enter any name on contract but those of owner or employee in charge, without regard to passes guaranteed by number of cars.

Agents of this company are not authorized to agree to forward live stock to be delivered at any specified time.

E. P. VINING,
General Freight Agent.
P. P. SHELBY,
Assistant General Freight Agent.

21 *Live Stock Contract.*

Original.

No. W. B., 583.
No. car, 531.
Initial, K.

JUNCTION CITY STATION, *Feb.* 28, 1882.

Memorandum of agreement made and entered into this day by and between the Union Pacific Railway Company, party of the first part, by its station agent at the above-named station, and Scott & Thurston, party of the second part:

Witnesseth, that whereas the said Union Pacific Railway Company transports live stock only as per tariff, which is hereby declared to be an essential part of this contract, and the rules and the regulations as above set forth:

Now, in consideration of the party of the first part transporting for the party *of the party* of the second part one car load of hogs loaded in cars, numbered as designated in margin, to Kansas City station, at the rate of tariff, — dollars per car load, being a special rate lower than the regular tariff rates, and for other good and valuable considerations, the said party of the second part does hereby

agree to load, unload, feed, water, and attend to the stock, and having examined the cars, to assume all risk of transportation, both as to the stock, and as to the individuals who may travel with it to attend to it, being all risk arising from any defect in the body of the car, or from imperfect doors and fastenings, and all risks of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly, or weak, or maiming each other or themselves, or in consequence of heat, suffocation, or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or any other material used by the owner for feeding the stock or otherwise; and also all risk of damages which may be sustained by reason of any delay in such transportation, and all risk of the escape or robbery of any portion of said stock, or of loss or of damage from any other cause or thing not resulting from defective trucks, wheels, or axles.

And it is further agreed that in case the said party of the first part shall furnish laborers to assist in loading or unloading said stock they shall be subject to the order and deemed the employees of the said party of the second part while so assisting.

And the said party of the second part hereby agrees that in case any injury to or loss of such stock shall occur, for which the Union Pacific Railway Company is justly liable, that the amount be by him claimed, so injured or lost, shall not exceed the sum of twenty dollars.

And furthermore, that in case a through rate is herein named to any point off of the Union Pacific Railway, that all other common carriers engaged in the transportation of said stock to such point shall enjoy all the special privileges and exemptions herein accorded to the Union Pacific Railway Company.

THE UNION PACIFIC RAILWAY COMPANY,
By J. COPLEY, *Agent.*
SCOTT & THURSTON, *Shipper.*

Agents will see that shippers are made perfectly familiar with the terms of the above contract before accepting their signature.

22 (Form 60.)

Union Pacific railway live stock contract for one care live stock from Junction City from Kansas City.

Date, Feb. 28, 1882.

Original.

Pass the party or parties named below upon freight trains conveying the within-mentioned cars of live stock upon presentation of special tickets No. —.

JAMES K. CULBERTSON.

Parties above named are in charge of stock.

J. COPLEY, *Agent.*

NOTE.—Full names of parties entitled to pass must be entered above over the signature of the agent, who must know that the correct name is entered, and run a pen through the remaining lines.

This contract must be filled in and signed with pen and ink, and is to be executed in duplicate. The original to be delivered to the shipper, and the duplicate to be forwarded to the freight auditor.

The original contract with receipted expense bill attached must accompany all claims for overcharge or loss and damage.

Agents will be particular to call the attention of shippers to this fact and request them to preserve the original contract, as claims will not be accepted or adjudged upon the duplicate under any circumstances.

All claims for overcharge or loss or damage should be sent to M. H. Goble, freight auditor, Omaha, Nebraska, for adjustment.

23 RUDOLPH MORGANFELDT, being first duly sworn, testified as follows on behalf of the defendant:

I have been car inspector of the Missouri Pacific R. R. at Junction City for two years and six months.

Their yard is beside the Union Pacific yard. Jolly is car inspector of the Union Pacific. I recollect when Harwood was hurt. Jolly asked me to help him to repair a car. We went down to a car at the shute, and found a big hole in each end of the car. We started to repair the hole in the south end of the car. Jolly sawed the boards off, and I nailed them on. Jolly got through at the north end of the car before I did, and picked up his boards and started for the other end, and I heard somebody call out, "Sam, there's some company for you." Jolly said, "Wait a few minutes, and the car will be ready." The hogs kept coming in after Harwood was hurt, so I had hard work to nail up the north end. It takes more power to move two cars than one.

J. NEWELL, being first duly sworn on behalf of defendant, testified as follows:

I work for the Union Pacific Railway Company, at its depot in Junction City, and did in February, 1882. I have been engaged there two and a half years. I was there Feb. 28, 1883. My duty is loading and unloading freight. I remember when Harwood was hurt. I was two car lengths away. I was going to the car at the shute to fasten it up. I had nothing to do but to seal the car, unless to help them if they wanted help.

I heard nothing about the condition of the car. Jolly was the only other servant of the company there at the time. I was between Porter's car and Scott's car when the accident happened, and so did not see it.

FRANK HARWOOD, being recalled, testified as follows:

I could not say whether we had to push the car all the way down the shute or not. I have no recollection of it running away from us. I don't know how we stopped it. It was down grade, and I knew it at the time. I know the car did not get away from us, because we did not have to push it back. We pushed it just to the shute.

The defendant here moved the court to strike out all evidence of custom and usage as to whether the company or shippers placed cars at the shute for loading, because the same is incompetent, irrelevant, and immaterial, and because it is not attempted to show that there was any custom or usage for shippers to push cars not fit for use to the shute, and because such evidence cannot be introduced to vary a written contract.

Which motion the court overruled, and defendant then and there, by its attorneys, duly excepted.

The defendant here rested its case.

The foregoing is all the evidence offered or given by either party in the cause, and the objection of the parties thereto, and the action of the court thereon, with the exception of the parties to such action.

24 At the proper time the parties respectively requested the court to give to the jury certain written instructions.

Copies of those requested by the plaintiff are as follows:

1. If the jury find from the evidence that the defendant company required shippers of live stock from Junction City to load their stock in its cars preparatory to shipment, or if it was the usage and custom of the company to permit shippers to load such stock on its cars for shipment, it was the duty of the company to take all reasonable and necessary precautions to render the shippers safe while engaged in the performance of that work.

Which instruction the court gave to the jury; to the giving of which instruction defendant at the time, by its attorneys, duly excepted.

2. If the jury find from the evidence that it had been, prior to the occurrence by which the plaintiff received his injuries, the custom and usage of the company to require shippers to place cars in position to be loaded with live stock, the plaintiff is not chargeable with wrong or negligence if he engaged in or assisted to place the car in position to be loaded on the day he received his injuries, if he exercised ordinary care on his part and acted in doing so in the manner that men of ordinary prudence would act under such circumstances, and he and others engaged in similar employments had a right to expect that the place where the work was to be performed in loading the stock was reasonably safe.

Which instruction the court gave to the jury; to the giving of which instruction the defendant at the time duly excepted.

3. It was the duty of the company to exercise every reasonable precaution and care to prevent the occurrence of accidents by motion of cars upon the track whereby injury may be done to those whose business with the company requires them to be upon its track or at work on its premises, and unless this is done the company is chargeable with negligence, and liable to parties injured through such negligence.

Which instruction the court gave to the jury; to the giving of which instruction the defendant at the time duly excepted.

4. The measure of damages, if the jury find for the plaintiff, is,

1st, the amount of money expended in medical attendance in the treatment of the injuries, and for medicines, for nursing, and attendance during sickness; a compensation for loss of time during the continuance of disability occasioned by the injury; also for physical pain and suffering, and for mental pain and anguish, when the same is the direct cause of the physical injuries, and a proper compensation for the impairment of health and physical vigor, if such exist, and which is directly traceable to the injury received.

Which instruction the court gave to the jury; to the giving of which instruction the defendant at the time, by its attorneys, duly excepted.

5. In the assessment of damages that are unliquidated the jury may exercise a sound discretion, and give, if they find for the plaintiff, what in their judgment will, under all the circumstances, constitute a full and adequate compensation.

Which instruction the court gave to the jury; to the giving of which the defendant at the time, by its attorneys, duly excepted.

25 6. It is a question of fact for the jury to determine under the evidence in this case whether the railway company was guilty of negligence in causing the injuries to plaintiff, as complained of.

Which instruction the court refused to give to the jury; to which refusal the plaintiff at the time, by his attorneys, duly excepted.

7. In a case of this character, when personal injuries have been sustained, slight negligence on the part of the plaintiff will not prevent a recovery, nor negligence which is only the remote cause of the injury.

Which instruction the court refused to give to the jury; to which refusal the plaintiff at the time, by his attorneys, duly excepted.

8. If the jury believe from the evidence in this case that the negligence of the defendant was the direct and immediate cause of the injury, and that of plaintiff only the remote cause; or if the negligence of the defendant was gross, and that of the plaintiff only slight, there is no such contributory negligence on the part of the plaintiff as will prevent his recovery for such damages as you find he has sustained under the evidence.

Which instruction the court refused to give to the jury; to which refusal plaintiff at the time, by his attorneys, duly excepted.

9. If the jury believe from the evidence in this case that the plaintiff is entitled to recover for the injuries he sustained, his measure of damages will be for loss of time on account of such injury, for expenses necessarily incurred in and about his sickness, including medical attendance and nursing, physical pain which has resulted from the injury up to the time of the commencement of the accident, and if the jury believe the plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injuries.

Which instruction the court refused to give to the jury; to which refusal the plaintiff at the time, by his attorneys, duly excepted.

The following are copies of the instructions which the defendant requested the court to give to the jury:

1. The plaintiff, by his petition, alleges that he was injured by the negligence of the defendant, without his fault, while he was engaged in the performance of a duty as the servant of Messrs. Scott & Thurston, which duty, as alleged by him, was to assist in the loading of hogs of Scott & Thurston into a car on the defendant's road, to be transported by it. The only negligence alleged against the defendant is that the defendant had left one of its cars upon the same track with the car which was to be loaded by Scott & Thurston, without having secured the car, by brakes or otherwise, to prevent it from moving unattended upon the track; and that said car was moved by a high wind then prevailing against him, crushing him between the two cars. He avers that it was his duty to watch the car and the shute through which the hogs were to be loaded into the car, to prevent the hogs from escaping, and that he was in the performance of that duty when he was injured.

By the petition the plaintiff admits that the proper duty of loading the cars rested upon his employers, Scott & Thurston, and, upon his own showing, the question does not arise in this cause for the jury whether it was the duty of the company to load or attend to the loading of the cars with the hogs of Scott & Thurston.

The questions to be decided are, first, was the plaintiff injured by his own misconduct, negligence, or want of caution, or the
26 negligence or want of caution of Scott & Thurston, or either of them, or any of their servants engaged in the same business with the plaintiff.

Second. Was the defendant chargeable with the want of ordinary care in the handling and managing of its cars upon the track?

Which instruction the court gave to the jury.

2. If the jury believe from the evidence that the defendant did not place the car to be loaded by Scott & Thurston at the shute of its stock yards, but did leave the said car coupled with another a car length or more from the shute, in an unsuitable condition, for want of repair to receive and safely transport the hogs, and if the plaintiff, his employees or co-servants uncoupled said cars, and by their own efforts pushed the same back to the shute without the direction or leave of the defendant, then the plaintiff has not proved the allegation of his petition and cannot recover.

Which instruction the court refused to give to the jury, to which refusal defendant at the time, by its attorneys, duly excepted.

3. If the jury believe from the evidence that the defendant did not place its car at the shute of its stock yards, but placed it away theaefrom coupled with another, and that the car was then in an unsuitable and unfit condition to be loaded with the hogs of Scott & Thurston until the same should be repaired, and that Scott & Thurston and the plaintiff and his co-servants knew that said car was not in condition to be loaded, and notwithstanding such knowledge they voluntarily uncoupled said car without the knowledge or direction of the defendant, and placed the car to be loaded at the shute, so that the hogs could, and one of them did, pass into the car before it

was repaired and made fit for the reception of the hogs, and all this without the knowledge or direction of defendant, then whatever accident or injury befell the plaintiff, by reason of the defect of the car, or of the hogs escaping into it, or in preventing it from escaping therefrom, cannot be imputed to defendant, and for such injuries the plaintiff cannot recover.

Which instruction the court refused to give to the jury; to the refusal to give which the defendant at the time, by its attorneys, duly excepted.

4. Scott & Thurston, the plaintiff, and their other servants, had not the right, without direction from the defendant, to uncouple the car, move it back to the shute, put down the apron, and remove all obstructions to the hogs going into the car while the same was in a defective and unsuitable condition to receive the hogs.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

5. If the jury believe from the evidence that the car was defective and unsuitable for the shipment of the hogs, and that Scott & Thurston, or plaintiff and their servants for Scott & Thurston, knowing that the car was unfit and not made ready for the loading the hogs, uncoupled the car from another, assumed and had control of it, moved it to the shute, so that the hogs could enter the car, and that they had unnecessarily placed the hogs in a position so that they could enter the car, and were about to escape therefrom, any injury that the plaintiff may have sustained in the endeavor to prevent the escape of the hogs is to be imputed to his own misadventure, and the want of care and caution in placing the car and the approaches from the yard in such a position as to lead him into danger.

Which instruction the court refused to give to the jury; to
27 which refusal defendant at the time, by its attorneys, duly excepted.

6. Scott and Thurston, or plaintiff and their other employees, without the direction of defendant, had no right to assure the control and handling of the car in which it was designed that the hogs should be transported when the same was in the unfit condition to receive the hogs.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

7. Scott and Thurston, or plaintiff or their servants, had not the right to handle or place the car in position to be loaded while the same was, to their knowledge, in an unfit condition therefor.

Which instruction the court refused to give the jury; to which refusal the defendant at the time, by its attorneys, duly excepted.

8. Scott and Thurston, or the plaintiff and his co-employees, had not the right to place the car and shute in such position as it would make it necessary for them to go upon the track while loading the hogs.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

9. If neither the servants of defendant nor Scott and Thurston and their employees had any reason to apprehend that the car left

on the track north of the shute would be moved by the wind, then the defendant was not guilty of negligence in leaving the car upon the track without the application of brakes.

Which instruction the court gave to the jury; to the giving of which instruction plaintiff, by its attorneys, duly excepted.

10. If the jury believes from the evidence that the car which ran upon the plaintiff would not have been moved by the wind if it had remained coupled with the one Scott and Thurston removed from it, then it was their fault, if any fault there was, if the brakes on that car were not set nor the wheels blocked.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

11. If the jury believes from the evidence that the two cars, one of which ran upon the plaintiff, were by defendant's servants left upon the track in the same condition they had been usually left as to setting the brakes or blocking the wheels, then the jury should find that the defendant exercised ordinary care in leaving the cars as they were.

Which instruction the court refused to give to the jury; to which refusal the defendant, by its attorneys, duly excepted.

12. If the jury believes from the evidence that the defendant did exercise ordinary care, which is such care as prudent persons ordinarily take of their own affairs, in placing the car upon the track, the jury cannot find that the defendant was guilty of negligence in leaving the cars upon the track in the way they were left.

Which instruction the court gave to the jury; to the giving of which instruction plaintiff, by its attorneys, duly excepted.

13. The fact that the car was moved by the wind is not to be taken as evidence of negligence of leaving the car without the brakes set or the wheels blocked.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

28 14. The defendant was not bound to anticipate anything not likely to occur, or to conduct its affairs as to prevent accidents not likely to happen.

Which instruction the court gave to the jury; to the giving of which instruction plaintiff at the time, by his attorneys, duly excepted.

15. If the jury believe from the evidence that the car was uncoupled and moved by plaintiff and Freeman, as testified by them, from the one moved afterwards by the wind, and this without the knowledge or direction of defendant, and that by reason of such uncoupling and removal the car left standing alone was thus rendered less stable and secure, and more likely to be removed by the wind, then if such car was moved by the wind the plaintiff was in fault to such a degree as to prevent his recovery in this cause.

Which instruction the court refused to give to the jury; to which refusal defendant at the time duly excepted.

16. It appears by the plaintiff's own testimony that the defendant left two cars upon its track coupled together, and that he, without the knowledge or direction of defendant, uncoupled or separated

said cars, and afterwards placed himself upon the railroad track of defendant with his face to one and his back to the other, and that while in that position the cars came together by the action of the wind, and that the plaintiff did not take any heed of the movement of said car, and did not look to see if the cars were moving; in such case he cannot recover, and the jury will find for the defendant.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

17. If the jury believe from the evidence that the plaintiff uncoupled the cars and removed one of them, and the car left was likely to be moved by the wind, it was the duty of the plaintiff before he separated the cars, so as to endanger himself if he chanced to be between them upon the track, to take care and block the wheels and set the brakes upon it, so as to prevent the same from being moved by the wind, and failure to do that prevents any recovery in this case.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

18. It appears by the plaintiff's own showing that he was well acquainted with the locality of the yards and with the track upon which the cars were placed by defendant; his opportunities of seeing the same and judging of the probabilities of cars moving were as good as those of the servants of the defendants employed about the yard; he saw the cars, and from their construction could judge as well as any one the effect of the wind then blowing upon them. He does not allege or pretend that the car was moved by a sudden or unprecedented gust of wind, and he was bound to know and anticipate all possibility of the car being moved by the wind, and upon interfering with the cars in such a manner as to enable him to place himself in danger, he was bound to take care that by his act injury to himself should not be incurred.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

19. It is not a question for an expert whether a car upon a railroad track, with brakes unset, is likely to be moved by the wind, and in this case, if there was any reason to appehend that the car left standing upon the track was likely to be moved by the
29 wind, the plaintiff was in just a good position to know it as the servants of defendant; and if there was any reason to apprehend that the car might be moved by the wind, and it was negligence to leave the car without the brakes being set, it was the negligence of the plaintiff, who changed the condition of the cars from that in which they had been left by defendant; and if by so doing he increased the possibility of it being moved by the wind he cannot recover.

Which instruction the court refused to give to the jury; to which refusal the defendant, by its attorneys, duly excepted.

20. The plaintiff had no right to handle the car which he assisted in pushing to the shute, so long as he knew that it was unfit for his employer's use; and if he was injured by reason of his handling the car in such condition, he cannot recover.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

21. If the occasion of the plaintiff going upon the track and occupying the position in which he was injured was the defects and insecurity of the car, and if the plaintiff knew of such defects and insecurity before he placed the car at the shute, his injury was caused by his own fault and misadventure, and the defendant is not liable.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

22. The fact that this car was out of repair cannot in any way help the plaintiff in this case; and if the jury believe that there would have been no necessity for the plaintiff to be upon the track, where he was injured, if the car had been repaired before it was placed at the shute, then the plaintiff cannot recover.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

23. If the plaintiff was negligent in uncoupling and moving the car in the condition it was in and placing it in the position in which he did, such negligence directly contributed to his injury, and the jury will find for the defendant.

Which instruction the court refused to give to the jury; to which refusal the defendant at the time, by its attorneys, duly excepted.

24. Any negligence of the plaintiff which directly contributed to the injury will prevent any recovery by him.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by his attorneys, duly excepted.

25. The jury cannot compare the negligence or supposed negligence of the parties. If the plaintiff was negligent, and his negligence directly contributed to the accident, it does not matter that the jury may suppose it to have been less than that of the defendant; the plaintiff in such case cannot recover.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

26. There is no ground for charging the defendant with gross negligence in this case.

Which instruction the court refused to give to the jury; to which refusal defendant at the time, by its attorneys, duly excepted.

30 Thereupon the court gave the jury the following instructions of its own motion:

1. If the jury find by the evidence that by the usage and custom of the railroad company the plaintiff had a right to move or assist in moving said car upon the track of said company to the shute to be loaded, and that by uncoupling or assisting to uncouple said car from the one with which it was coupled without applying the brakes or putting blocks against the wheels of the same was guilty of a want of ordinary care, or that care which men of ordinary prudence would exercice under like circumstances, and thereby contributed directly to the injuries received by him, in such case he could not recover.

To the giving of which instruction defendant at the time, by its attorneys, duly excepted.

2. If the jury find from the evidence that the railroad company required shippers of live stock from Junction City to load their stock on its cars, or it was the usage or custom of said company to permit shippers so to do, and that the plaintiff, or he with others, by putting said hogs in the shute pen, and by placing the said car in the condition it was then in, in position before said shute, and thereafter going to the end of said car upon the track where the accident occurred was guilty of a want of that care which men of ordinary prudence would exercise under like circumstances, and thereby contributed directly to the injuries received by him, in such case he could not recover.

To the giving of which instruction the defendant at the time, by its attorneys, duly excepted.

3. If the jury find from the evidence that said company neither by usage nor custom nor contract had given the plaintiff or his employers the right to go upon its tracks to move cars or load them, and that it was not necessary for him to go upon the track to properly load said car, in such case he would be a trespasser in going upon said tracks, and if injured while so trespassing he would not be entitled to recover therefor.

To the giving of which instruction defendant at the time, by its attorneys, duly excepted.

4. If the jury believe from the evidence that the plaintiff's negligence contributed to the injury complained of he cannot recover, but if such negligence was only slight or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause.

To the giving of which instruction defendant at the time by its attorneys, duly excepted.

5. To the jury belong exclusively the duty of determining every question of fact in the case. It is their special province to weigh the evidence and determine the credibility of the testimony of the witnesses. You will therefore take evidence submitted to you, carefully and honestly weigh and consider it without partiality for or prejudicial against either of the parties, and bring in your verdict in accordance with it and the instructions given you by the court. With these instructions, after listening to the arguments of counsel, the case will be submitted to you.

To the giving of which instruction defendant at the time, by its attorneys, duly excepted.

The foregoing are all the instructions requested by either party, whether given or refused by the court, and all the instructions
31 given by the court of its own motion, together with the exceptions of the parties to the actions of the court upon said instructions.

In due and proper time the defendant presented to the court certain written interrogatories, which it requested the court to submit

to the jury and require them to return answers thereto with their general verdict.

The court submitted said interrogatories as requested, and the jury retired, under the charge of a sworn bailiff, to consider of their verdict, and on the 28th day of March, 1883, they returned into court with their verdict, a copy of which is as follows:

Verdict.

FRANK HARWOOD *vs.* THE UNION PACIFIC RAILROAD COMPANY.

We, the jury, empaneled in this case, find for the plaintiff, and assess his damages at $3,500 (thirty-five hundred dollars).

JOHN CROWTHER, *Foreman.*

And at the same time they returned the said interrogatories with their answers thereto, copies of which interrogatories and answers are as follows:

STATE OF KANSAS, }
Davis County, } *ss:*

In the District Court Sitting in said County.

FRANK HARWOOD, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The court is respectfully requested to direct the jury to make answer to the following interrogatories:

1st. Did the defendant, on the 28th day of February, 1882, leave two of its cars on the side track coupled together a short distance north of the shute in its stock yards in Junction City?

A. Yes.

JOHN CROWTHER, *Foreman.*

2. Were the said cars brought and left on said side track in the presence of plaintiff?

A. Yes.

JOHN CROWTHER, *Foreman.*

3. Did the plaintiff see and know at the time the cars were so left what the servants of defendant did in respect to the same?

Ans. No; as regards setting of brakes or blocking the cars.

JOHN CROWTHER, *Foreman.*

4. Did the plaintiff see and know at the time said cars were brought upon the track and left by the defendant's servants that the cars were out of repair and unfit for the loading of hogs for transportation?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

5. Did the plaintiff or another employee of Scott & Thur-
32 son soon thereafter uncouple the two cars, and then the two men push the south car of the two along the track to the shute?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

6. Did the plaintiff know when he started to push said car along the track whether the brakes were set or the wheels were blocked of the car they left standing?

Ans. No.

JOHN CROWTHER, *Foreman.*

7. Did he look to see whether the brakes of said standing car were set or the wheels blocked?

Ans. No.

JOHN CROWTHER, *Foreman.*

8. Were the plaintiff and Freeman, or either of them, directed by any one to uncouple the cars and move one of them to the shute? And, if so, name the person.

Ans. No.

JOHN CROWTHER, *Foreman.*

9. When the plaintiff helped to push said car along the track to the shute, had said car then been repaired and put in a suitable condition for the loading and transportation of Scott & Thurston's hogs?

Ans. No.

JOHN CROWTHER, *Foreman.*

10. When the cars were left upon the track, and the plaintiff helped to push along said car to the shute, was there not a hole in each end of said car large enough for the hogs to escape therefrom?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

11. Did not the plaintiff know the condition of said car in respect to whether it was ready for the loading of the hogs at the time he assisted to push the car along to the shute?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

12. Before the said car had been uncoupled by plaintiff or Freeman and pushed down to the shute, did not Scott & Thurston, or their employees, with the knowledge of plaintiff, place their hogs in the last pen of stock yards into which the shute opened, where there was no gate or anything else to prevent the hogs from going from said pen through the shute and into the car when the car should be placed at the shute?

Ans. To the first part of the question, ending with the words "the shute opened," our answer is yes; to the second part of the

question, commencing with the word "where," and ending with the words "at the shute," the jury find that the evidence was insufficient to enable them to give an answer.

JOHN CROWTHER, *Foreman.*

13. Did Scott, of the firm of Scott & Thurston, plaintiff's employees, with the knowledge of plaintiff, go to request the defendant's servants to repair the car before the plaintiff and Freeman went upon the track to uncouple and move the car?

Ans. They went at about the same time, but we are unable
33 to state who started first.

JOHN CROWTHER, *Foreman.*

14. Were there not pens or apartmens in the stock yards of the defendant where the hogs of Scott & Thurston could have been placed, which could have securely held them and prevented them from going into the shute until the car was placed at the shute and repaired and made ready for their loading and transportation?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

15. Did a qualified servant of the defendant come with material for the repair of the car soon after the car had been placed at the shute by plaintiff and Freeman?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

16. Was not said servant prevented from entering said car by the door, because the same was obstructed by being placed at the shute?

Ans. No.

JOHN CROWTHER, *Foreman.*

17. Was not said servant of defendant obliged to enter the car through one of the holes which he came to close?

Ans. No.

JOHN CROWTHER, *Foreman.*

18. Upon entering the car, did said servant of defendant immediately proceed to repair and make the same secure for the reception and transportation of the hogs of Scott & Thurston?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

19. While said servant of defendant was engaged in the repair of the car, did not a hog of Scott & Thurston's enter the car through the shute?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

20. Which end of car, north or south, did said servant of the defendant first repair?

Ans. South.

JOHN CROWTHER, *Foreman.*

21. Had said servant of the defendant commenced to repair the aperture at the north end of the car at the time the hog entered?
Ans. No.

JOHN CROWTHER, *Foreman.*

22. Did not the hog, upon entering the car, move towards the hole in the north end of the car, as if to escape thereat?
Ans. Yes.

JOHN CROWTHER, *Foreman.*

23. After the hog escaped into the car, did not the plaintiff run from the shute directly to the north end of the car, standing at the shute, and stand on the track at the north end of the car, with his face towards the north end of the car, for the purpose of preventing the hog from escaping through the hole in the north end of the car?
34 Ans. Yes.

JOHN CROWTHER, *Foreman.*

24. While the plaintiff was going from the shute to the north end of the car, was he not going north in the direction of the car that had been left on the track north of the shute?
Ans. Yes.

JOHN CROWTHER, *Foreman.*

25. While the plaintiff was going from the shute to the north end of the car, did he look along the track to see if a car was approaching?
Ans. No.

JOHN CROWTHER, *Foreman.*

26. Was the plaintiff instantly hit and injured, as he complains, after he had placed himself upon the track to prevent the escape of the hog?
Ans. Soon after.

JOHN CROWTHER, *Foreman.*

27. Did the plaintiff go to the north end of the car solely to prevent the escape of the hog through the hole, yet to be closed up by defendant's servant?
Ans. Yes.

JOHN CROWTHER, *Foreman.*

28. If the car had been in suitable condition to receive the hogs, would there have been any occasion for the plaintiff to have gone on the track at the place where he was injured; if so, what?
Ans. Yes, to examine the car.

JOHN CROWTHER, *Foreman.*

29. In the loading of hogs into cars built like the one in question, which are in good repair at the shute of defendant, where plaintiff was injured, is there any necessity for the person loading the hogs to be upon the track of defendant after the cars have been placed at

the shute, and while they are so loading? And, if so, state what such necessity is

Ans. to No. 29. Answer to first paragraph ending at the word shute, Yes, to examine the car. Answer to second paragraph, commencing with the words "and while," No.

JOHN CROWTHER, *Foreman.*

30. Were the hogs of Scott & Thurston, which the plaintiff was employed to assist in loading, to be transported under the contract partly in print and partly in writing, introduced in evidence in this case?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

31. Were not all the former shipments of stock by Scott & Thurston made under like contracts?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

32. Were not the shipments of stock testified to by other witnesses of plaintiff made under written or printed contracts?

Ans. Yes.

JOHN CROWTHER, *Foreman.*

35 33. What was the distance between the car at the shute, where plaintiff was injured, and the car he left standing on the track north of the shute?

Ans. From 50 to 80 feet.

JOHN CROWTHER, *Foreman.*

34. Did the defendant company place three cars upon the side track, one for Potter to load, and one of them for Scott & Thurston, with the intention and expectation that Potter should bed his car and then first load his stock?

Ans. No.

JOHN CROWTHER, *Foreman.*

And as soon as said questions and answers were returned into court by the jury, and as they were read by the clerk, the defendant objected to the court receiving the answers to the questions 3, 12, 13, and 29, as each of said questions & answers were read, and requested the court to require the jury to retire and make more specific and direct answers to said four questions, and each of them, which the court refused to do; and to such refusal, defendant at the time duly excepted, and the verdict and questions and answers were received and the jury discharged from the further consideration of the case. To the receiving of the verdict and answers and the discharge of the jury defendant at the time duly excepted.

On the 29th day of March, 1883, the defendant filed its motion for judgment in its favor upon the answers of the jury to the special interrogatories, notwithstanding the general verdict, a copy of which verdict is as follows:

STATE OF KANSAS, } ss:
Davis County, }

In the District Court sitting in the said County.

FRANK HARWOOD, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant and moves the court to render judgment in this case in favor of defendant upon the answers to special questions made by the jury herein, notwithstanding the general verdict.

J. P. USHER & CHAS. MONROE,
Attorneys for Defendant.

Said motion came on immediately to be heard; and the court, having heard the arguments of counsel thereon, overruled said motion; and defendant then and there duly excepted.

On the 29th day of March, 1883, the defendant also filed its motion for a new trial of this cause, a copy of which motion is as follows:

36 STATE OF KANSAS, } ss:
Davis County, }

In the District Court sitting in said County.

FRANK HARWOOD, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant and moves the court to vacate and set aside the verdict of the jury rendered in this cause, and to grant a new trial therefor, for the following reasons materially affecting the substantial rights of defendant:

1. On account of excessive damages appearing to have been given under the influence of passion and prejudice.
2. Because the verdict is not sustained by sufficient evidence.
3. Because the verdict is contrary to law.
4. Because the court erred in admitting certain testimony offered by plaintiff to which the defendant duly objected and excepted.
5. Because the court erred in refusing to admit certain testimony offered by defendant, to which refusal defendant duly excepted.
6. Because the court erred in overruling defendant's demurrer to the evidence introduced by plaintiff, to the overruling of which demurrer defendant duly excepted.
7. Because the court erred in giving to the jury certain instructions requested by plaintiff, to the giving of which instructions the defendant at the time duly excepted.
8. Because the court erred in giving to the jury certain instructions of its own motion, to the giving of which instructions the defendant at the time duly excepted.
9. Because the court erred in refusing to give to the jury certain

instructions requested by defendant, to which refusal defendant at the time duly excepted.

10. Because the court erred in refusing to require the jury to retire and make more specific and direct answers to certain specific questions submitted to them to answer.

11. Because of other errors of law occurring at the trial and duly duly excepted to at the time by the defendant.

J. P. USHER &
CHAS. MONROE,
Attorneys for Defendant.

Said motion came to be heard on said 29th day of March, 1883, and the court having heard the arguments of counsel thereon overruled said motion, and to the order of the court overruling said motion the defendant, by its attorneys, at the time duly excepted.

And on the said 29th day of March, 1883, the court rendered judgment on the general verdict of the jury in favor of the plaintiff, Frank Harwood, against the Union Pacific Railway Company, defendant, for the sum of three thousand five hundred dollars and cost of suit taxed at $69.43, to which judgment
37 defendant at the time, by its attorneys, duly excepted. And the court gave the defendant sixty days from said date to make and serve its case made for the supreme court upon the plaintiff or his attorneys, and the plaintiff ten days thereafter to make and suggest amendments to said case made and serve the same upon the defendant or its attorneys.

I hereby certify that the foregoing case made contains a true and complete statement of all the evidence, pleadings, instructions, verdict, judgment, and of all other matters and proceedings in this case necessary to present the errors complained of to the supreme court.

I further certify that said case made was duly served upon the plaintiff within the time required by the court; that the plaintiff made his suggestions of amendments to said case made, and served the same upon the defendant within the time required by the court, and both parties now appearing before me in conformity to a notice given them by me, I hereby certify this case made, and direct the same to be attested by the clerk of this court and the seal of this court to be hereto attached, and this case made to be filed in this court in this case.

J. H. AUSTIN,
Judge of said Court.

JUNCTION CITY, KANSAS, *June 30th*, 1883.

Attest: J. B. CALLEN, [SEAL.]
Clerk of said Court.

Service of this case made is hereby acknowledged, this 21st day of May, 1883.

McCLURE & HUMPHREY,
Attorneys for Plaintiff.

We hereby waive service of summons in error in this case, and hereby enter our appearance in the supreme court.

McCLURE & HUMPHREY,
Attorneys for Def't in Error.

38 And also on, to wit, the 1st day of August, 1883, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error in the above-entitled cause, which is in words and figures as follows, to wit:

39 In the Supreme Court of the State of Kansas.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK HARWOOD, Defendant in Error.

The above-named plaintiff in error respectfully shows to the court that on the 29th day of March, 1883, the district court of Davis county, Kansas, rendered a judgment in favor of the above-named Frank Harwood and against the said Union Pacific Railway Company for the sum of three thousand five hundred dollars and costs of suit taxed at sixty-nine dollars and forty-three cents in a suit then pending in said court, in which the said Frank Harwood was plaintiff and the said Union Pacific Railway Company was defendant.

The case made — filed in said district court in said cause is hereto attached and made part hereof, and marked "A."

The plaintiff in error alleges that said district court made the following errors upon the trial of said cause, each of which was duly excepted to at the time by said Union Pacific Railway Company:

1. The court erred in overruling the demurrer filed by the defendant to the petition of plaintiff.
2. The court erred in denying the petition of defendant to remove the cause to the circuit court of the United States for the district of Kansas.
3. The court erred admit-ing certain evidence offered by the plaintiff.
4. The court erred in overruling the demurrer filed by defendant to the evidence introduced by plaintiff.
5. The court erred in refusing to admit certain evidence offered by defendant.
6. The court erred in overruling the motion of the defendant to strike out certain evidence introduced by plaintiff.
7. The court erred in giving to the jury certain instructions requested by plaintiff.
8. The court erred in giving to the jury certain instructions of its own motion.
9. The court erred in refusing to give to the jury certain instructions requested by the defendant.
10. The court erred in refusing to require the jury to retire and make more specific and direct answers to certain special questions submitted to them to answer.
11. The court erred in overruling the motion of defendant for

judgement in its favor upon the special questions and answers, notwithstanding the general verdict.

12. The court erred in overruling the motion of defendant for a new trial.

13. The court erred in rendering judgement in favor of plaintiff and against the defendant.

Wherefore the plaintiff in error prays this court to reverse the judgement of the said district court of Davis county, Kansas, in this cause, and to remand the cause to said district court for a new trial.

J. P. USHER,
CHAS. MONROE,
Attorney- for Plaintiff in Error.

40 And also on, to wit, the first day of August, 1883, there was filed in the office of the clerk of the supreme court of the State of Kansas, by the defendant in error in the above-entitled cause, a waiver of issuance and service of summons in error, which is in words and figures as follows, to wit:

41 We hereby waive service of summons in error in this case, and hereby enter our appearance in the supreme court.

McCLURE & HUMPHREY,
Attorneys for Def't in Error.

42 And afterwards, on, to wit, the 7th day of November, 1883, the same being one of the regular judicial days of the July term, 1883, of the supreme court of the State of Kansas, before said court in session at the supreme-court room in the city of Topeka, Kansas—

Present: Hon. Albert H. Horton, chief justice; Hon. D. M. Valentine, and Hon. D. J. Brewer, associate justices, and C. J. Brown, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit (P. 189, Journal "J."):

43 THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK HARWOOD, Defendant in Error. } 2986.

This cause came on to be heard on petition in error and the transcript of the record of the district court of Davis county, and thereupon, after oral argument by J. P. Usher, attorney for plaintiff in error, the cause was submitted on briefs of counsel for both parties herein, and taken under advisement by the court.

44 And afterwards, on, to wit, the 7th day of November, 1883, the same being one of the regular judicial days of the January, 1884, term of the supreme court of the State of Kansas, before said court in session at the supreme-court room in the city of Topeka, Kansas—

Present: Hon. Albert H. Horton, chief justice; Hon. D. M. Val-

entine and Hon. D. J. Brewer, associate justices, and C. J. Brown, clerk of said court, the foll owing proceeding, among others, was had and entered of record as follows, to wit (P. 295, Journal "J."):

45 THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK HARWOOD, Defendant in Error. } 2986.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed, with costs, and hereof let execution issue.

Horton, C. J., delivered the opinion of the court, all the justices concurring.

46 And afterward, on, to wit, the 7th day of February, 1884, the same being one of the regular judicial days of the January term, 1884, of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court a syllabus and opinion of the court in said cause, which is in words and figures as follows, to wit:

47 *Syllabus.*

THE UNION PACIFIC RAILWAY COMPANY *v.* FRANK HARWOOD.

Error from Davis County.. Affirmed.

By the court, HORTON, C. J.:

Where a shipper of stock has a contract with the railway company for himself to load his stock upon the cars of the company at its stockyards, and a car is furnished him near the shute of the yards for his use, and one of his employés uncouples it from another and pushes it down to the shute for the purpose of loading the stock, the railway company, in the management of its other cars, owes the duty of exercising ordinary care and diligence to the shipper and his employés while they are engaged in loading the car and doing such other work preparatory to loading as is usual and necessary to do. Held, also, that if the company is guilty of ordinary negligence in leaving a car unattended upon the same track with the car to be loaded by the shipper without having secured the same by brakes or otherwise to prevent it from moving, and the car is moved by a hard or strong wind against the car about to be loaded and upon an employé of the shipper, and the employé is without fault and free from any negligence or wrongful act on his part directly contributing to the injury, the railway company is liable to him for the result of its negligence.

All the justices concurring.

48 THE UNION PACIFIC RAILWAY COMPANY *vs.* FRANK HARWOOD.

Error from Davis County. Affirmed.

The opinion of the court was delivered by HORTON, C. J.:

This was an action brought by Frank Harwood against the Union Pacific Railway Company to recover damages for personal injuries alleged to have been sustained through the negligence of the railway company. The evidence conduced to show that Scott & Thurston, residing at Junction City, in this State, were engaged in the business of shipping live stock over the Union Pacific to Kansas City; that Harwood was in the employ of the firm as a clerk; that Scott & Thurston had ordered from the railway company the day prior to February 28, 1882, a car to ship hogs in; that on said February 28, between 11 and 12 o'clock, they, with their employés, including Harwood, went to the railway stock yards, at Junction City, to load the hogs in a car; that the train by which the shipment was to be made was due about 12 o'clock; that the car in which the hogs were to be loaded was not on the track when the parties got there; that the first thing Harwood did after he got down to the stock yards was to drive the hogs from Scott & Thurston's yard into a pen of the Union Pacific Stock Yards, which had a shute opening into it through which the hogs could pass or be driven up into the car in which they were to be loaded; that he had assisted Scott & Thurston to load hogs and other stock at these yards for the last four or five years; that an engine hauled two cars past the shute and left them in the presence of Harwood, the nearest one being about 30 feet north of the shute; that the engine was then uncoupled and pulled up to the switch on to the main track; that the two cars hauled by the engine were left coupled together; that the yard master,
49 whose duty it was to station cars, directed these two cars to be left north of the shute; that the yard master pointed out to Scott, of the firm of Scott & Thurston, the car nearest the shute as the one he was to use; that there were three or four boards out at each end of the car pointed out; that Scott went after the car inspector to come and repair it; that about the same time his employés, either Freeman or Harwood, uncoupled the two cars and moved the car to be loaded by Scott & Thurston by hand down to the shute; that the brakes were not set nor the wheels blocked of the other car left standing 50 to 80 feet north of the shute; that the car inspector, with another man—one Morganfeldt—came down and went inside of the car to fix it; that they closed up the hole in the south end of the car and were going towards the north end; that at this time the wind was blowing quite hard, and it was slight down grade to the shute from the place where the car was left standing and unattended on the north; that Harwood was climbing up the shute to get in with the hogs so as to load them into the cars; that one of the hogs got into the car from the shute about this time, and he changed his mind about climbing up and passed around to the north end of the car to prevent the escape of the hog through the opening in the car; that his face was to the south; that while

thus employed the car left standing on the track moved by the wind, came down the track, collided with the car at the shute, and caught Harwood between the draw heads, inflicting upon him severe and painful injuries; that Harwood had no knowledge the brakes were not applied to the car left standing and unattended north of the shute; that Scott asked the yard master to place the car for him to load his hogs in at the shute, but it was hauled north past the place and stopped at the yard master's signal; that when the company did not place cars at the shute by the engine to be
50 loaded, the shippers were in the habit of placing them there; that the company furnished the cars to Scott & Thurston, and the latter always loaded them.

The railway company claims the petition did not state a cause of action; that the court erred in overruling the demurrer to the evidence introduced by the plaintiff below, and further erred in overruling the motion of the railway company for judgment upon the special findings. The principal question presented is whether, under the allegations of the petition and the evidence introduced upon the trial, Harwood was lawfully upon the track of the railway company at the time he was injured, and, therefore, whether the railway company owed to him any duty. If he had no legal right to be upon the track, or if he was a mere volunteer there, then, of course, the law imposed no duty upon the railway company, except the general duty which every man owes to others, to do them no intentional wrong or injury. Under the contract between the railway company and Scott & Thurston, the latter was to load the hogs in the car. Scott requested the yard master to place the car for him at the shute, so that he could load his stock in it. Instead of being placed at the shute it was hauled, coupled with another, some distance north of it, and then the yard master pointed out to Scott this car as the one he was to use. After the yard master pointed out to Scott the car for him to load in, he seemingly relinquished all further care and control over it. After this car had been hauled north of the shute, and the engine hauling it had pulled up to the switch on the main track, Scott & Thurston had no easy or convenient way to place the car at the shute of the stock yard other than by having their employés push it down by hand. Their employés, including Harwood, were not, therefore, trespassers or volunteers in uncoupling the car and pushing it down to the shute. They were acting for
51 Scott & Thurston, and were lawfully upon the track in charge of one of the cars of the company, with the consent of the railway company. Therefore, to them the railway company, in the management of its cars, owed the duty of exercising ordinary care and diligence. It was the duty of the company to take all necessary and reasonable precaution to render Scott & Thurston and their employés safe while engaged in the performance of the work about the car turned over to them for shipping the hogs, and while Harwood and the other employés of Scott & Thurston were on the track, near the stock yards, attending to the business of Scott & Thurston, about the loading of the hogs in the car set apart for their use, or doing other work preparatory to loading, as was usual

and necessary to do, the railway company had no right to endanger their persons or lives by the want of ordinary care in the handling and management of its other cars. If the railway company was guilty of ordinary negligence in leaving a car unattended upon the same track with the car to be loaded by Scott & Thurston, without having secured the same by brakes or otherwise, to prevent it from from moving upon the track, and the car was moved by the high wind then prevailing against Harwood, and the latter was without fault himself, and free from any negligence or wrongful act on his part directly contributing to the injury, the railway company must be held liable for the injury resulting to him from its negligence. Stinson *v.* Railroad Co., 32 N. Y., 333; Haley *v.* Railroad Co., 7 Hun., 84; Brown *v.* Railroad Co., 8 La., 45; Newson *v* Railroad Co., 29 N. Y., 83; see also Nicholson *v.* Railroad Co., 41 N. Y., 526.

Within the law thus stated the petition was not fatally defective. As there was evidence of actionable negligence on the part of the company the case was not, therefore, one to be taken from the jury.

52 The question whether there was contributory negligence on the part of Harwood was for the determination of the jury, under proper instructions as a matter of fact. The jury found against the railway company. The findings of the jury are not, we think, inconsistent with the general verdict, and the motion of the company for judgment upon the findings was properly overruled.

Complaint is made concerning certain testimony admitted tending to show the custom in respect to shippers handling the cars in the stock yards at Junction City. The contract under which Scott & Thurston shipped their hogs on February 28, 1882, required them to load the stock, and as the yard master of the company pointed out and turned over to them the car afterwards pushed down to the shute for their use, the evidence, under the circumstances could not have been prejudicial, because it is apparent that the yard master expected Scott & Thurston to use the identical car they did use for the shipment of their hogs, and to load it with the hogs it was necessary to be placed at the shute. It was taken north of the shute and stopped, and then turned over for their use. Had Scott & Thurston, or their employé, Harwood, without the consent of the company, taken the car, or if the yard master had informed Scott & Thurston, or their employés, that the car was not to be uncoupled or moved until repaired, a different question would be presented for our consideration. Further, the evidence tending to show the company furnished the cars and the shippers loaded them, and that when the company left the cars a short distance from the shute the shippers placed them at the shute, did not vary or modify the written contract in evidence; at most, this evidence merely showed the manner of transacting business where the shippers were to load the stock.

53 The instructions are also greatly criticized, but, after a careful examination of all the objections made to them, we do not perceive any error sufficient to authorize us to grant a new trial. The railway company asked that the jury should be instructed not to compare the negligence, or supposed negligence, of the par-

ties. This instruction might very properly have been given; but, as the court carefully and fully directed the jury upon all the issues, the omission of this instruction is not sufficient to overturn the judgment. Many rulings of the trial court were commented upon in the case of Railway Co. *v.* Peavey, 29 Kas., 169; but we did not decide in that case that every error referred to was of itself sufficiently material and substantial to cause a reversal of that judgment.

The decision of the court below against the removal of the case to the Federal court must be sustained, under the authority of Railway Co. *v.* Dyche, 30 Kas., —.

The judgment of the district court will be affirmed.

All the justices concurring.

54 And also on, to wit, the 7th day of February, 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, which is in words and figures as follows, to wit:

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in a record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Union Pacific Railway Company and Frank Harwood, wherein a right was claimed under a statute of the United States, and the decision was against the right specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said Union Pacific Railway Company, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,

56 if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. S. THOMAS,
Clerk Circuit Court of the United States, District of Kansas.

The above writ allowed, this seventh day of February, A. D. 1884.

ALBERT H. HORTON,
Chief Justice of Kansas.

[Endorsed:] 2986. The Union Pacific Railway Company *v.* Frank Harwood. Writ of error. Filed Feb. 7, 1884. C. S. Brown, clerk sup. court.

57 And also on, to wit, the 7th day of February, 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-enitled cause, which bond is in words and figures as follows, to wit:

58 Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK HARWOOD, Defendant in Error.

Know all men by these presents, that I, J. P. Usher, of Lawrence, Douglas county, Kansas, am held and firmly bound unto Frank Harwood, of Davis county, Kansas, in the sum of eight thousand dollars, to be paid to the said Frank Harwood, his executors or administrators.

To which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated this seventh day of February, A. D. 1884.

Whereas the above-named Union Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named Union Pacific Railway Company shall prosecute its said writ of error to effect, and answer all costs and damages, including just damages for delay, if it shall fail to make good its pleas, then this obligation shall be void; otherwise to remain in full force and virtue.

J. P. USHER. [SEAL.]

STATE OF KANSAS, } *ss:*
Shawnee County, }

I, J. P. Usher, being first duly sworn, do say: That I am worth more that the sum of ten thousand dollars in the State of Kansas, and have property in the State of Kansas not exempt from execution of the value of more than ten thousand dollars.

J. P. USHER.

59 Subscribed and sworn to before me, this seventh day of February, A. D. 1884.

[SEAL.]

C. J. BROWN,
Clerk Supreme Court.

This bond approved, this 7th day of February, 1884.

ALBERT H. HORTON,
Chief Justice of the State of Kansas.

60 And also on, to wit, the 7th day of February, 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, which, with the endorsements thereon, is in words and figures as follows, to wit:

61 UNITED STATES OF AMERICA, *ss:*

To Frank Harwood, Greeting:

You are hereby cited and admonished to be and appear at — Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein the Union Pacific Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this seventh day of February, in the year of our Lord one thousand eight hundred and eighty-four.

ALBERT H. HORTON,
Chief Justice of the State of Kansas.

(Endorsed:) Service of the within citation is hereby acknowledged, this seventh day of February, A. D. 1884. McClure & Humphrey, att'ys of record for def't in error.

62 I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above-entitled cause, as the same appear of record and on file in my office.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office in the city of Topeka, in said State, this 26th day of August, A. D. 1884.

[SEAL.]

C. J BROWN,
Clerk Supreme Court.

Endorsed on cover: Kansas sup. court. No. 980. The Union Pacific Railway Company, plaintiff in error, *vs.* Frank Harwood. Filed 3rd October, 1884.

115

NOV 10 1884

In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY CO.
vs.
F. HARWOOD.
No. 980

Brief of W. Hallett Phillips for Defendant in Error.

On July 13th, 1882, Harwood brought suit against the defendant company, in the District Court of Davis County, Kansas.

His petition claimed damages for a personal injury, sustained through the negligence of the defendant.

The defendant, demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. At the same time the defendant filed its petition and bond for the removal of the cause, to the Circuit Court of the United States.

The petition contains the same allegations as those set forth in the cases of *Union Pacific R. R. Co.* vs. *Myers, Kansas City, and Knuth*, to wit, that petitioner is a corporation other than a banking corpor-

ation, created under an act of Congress, and that it has a defense arising under the laws of the United States. (R. 3.)

The removal was refused, and thereupon the defendant filed its answer. In this the defense is set up, that the accident by which the plaintiff was injured, was caused by his own negligence, and without any negligence on the part of the defendant. (R. 5.)

At the trial, the defendant demurred to plaintiff's evidence. This demurrer was overruled.

There was a verdict and judgment in favor of plaintiff for $3,500. The case was taken by defendant to the Supreme Court of the State, where the judgment was affirmed.

The sole issue in the trial court, was whether or not the plaintiff was injured, through the negligence of defendant.

As stated in the bill of exceptions "the questions to be decided are, first, was the plaintiff injured by his own misconduct, negligence, or want of caution of Scott and Thurston (his employers), or of any of their servants. Second, was the defendant chargeable with the want of ordinary care in the handling and managing of its cars upon the track." R., 25.

In its opinion, the Supreme Court of Kansas say, that the decision of the court below refusing the re-

moval of the case, must be sustained under the authority of *Railway Co.*, vs. *Dyche*, 31 Kans., 120.

That case was an action brought in the State Court against the Union Pacific Railway Co. to recover damages for the destruction of a field of rye, on account of the diversion by the Company of a natural watercourse.

The defendant answered with a general denial of the facts contained in plaintiff's petition, and also alleged that the damages sustained, were suffered through the negligence of plaintiff.

The defendant filed its petition for a removal of the cause alleging that it was a corporation created by Act of Congress. The Supreme Court of Kansas sustained the judgment of the court below refusing a removal. They express their concurrence in the opinion of Justices Miller and McCrary, in *Union Pac. R. R.*, vs. *Myers*.

The case of *U. P. R. R. Co.*, vs. *Dyche*, was brought to this court by the company, and is No. 981, on the docket.

The present case and that of Dyche, present the precise same point as that involved in Union Pac. Railway against Myers, Kansas City, and Knuth, and the Texas and Pacific Railway against McAllister, Kirk and Murphy.

This court can only examine the judgment of the Supreme Court of Kansas, on the question of removal.